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ABSTRACT

If the United States Supreme Court is to exercise its historic role as guardian of the fundamental freedoms flowing from the speech and press clauses of the first amendment, it is imperative that those basic freedoms be placed in a preferred position. The preferred position doctrine provides adequate safeguards for both speech and press guarantees if it is carefully applied by the courts. This is true because the doctrine reflects more than its original emphasis upon elimination of the presumption of constitutionality employed during the 1940s. Not only does the doctrine have strong historical underpinnings, but its premises are applicable, individually or in tandom with other judicial doctrines, in a wide range of contexts. The doctrine also tends to place the courts in a more active role in protecting freedom of expression. While the preferred position approach may not give the absolute answers sought by the strict constructionists, it does supply standards for judicial judgments that would be more acceptable to first amendment libertarians than the balancing-of-interests approach presently being used by the Supreme Court. (FL)

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FIRST AMENDMENT SPEECH AND PRESS THEORY: PREFERRED POSITION POSTULATE REEXAMINED

by

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FIRST AMENDMENT SPEECH AND PRESS THEORY: PREFERRED POSITION POSTULATE REEXAMINED

It has generally been held that freedom of speech and press are not absolute rights and, despite the efforts of Justices Black and Douglas, that the language of the first amendment was never intended to be strictly construed.[1] Indeed, in the landmark prior restraint decision, Near v. Minnesota, the Supreme Court's first great anti-censorship case, Chief Justice Hughes, writing for the majority, held that first amendment speech and press guarantees were limited by the co-existing rights of others (as in the matter of libel) and by the demands of public decency and national security.[2]

A more crucial test of the first amendment came, however, within the first decade following ratification of the Bill of Rights in 1791. Passage of the Alien and Sedition Acts, which punished the publication of false, scandalous, and malicious writings against the government, aroused great popular indignation during its brief two-year life span. President Jefferson, upon assuming office in 1801, pardoned all persons still imprisoned under its provisions.[3]

One of Alexander Hamilton's prescient arguments against a Bill of Rights guarantee for "the liberty of the press" was the impracticality of any attempt to make such "fine distinctions" since freedom ultimately depends on "public opinion" and "the general spirit of the people and the government."[4] Nearly two centuries after ratification of the first amendment, the crucial question may still be: Would there be a popular outcry from the public today if freedom of speech and press were to be seriously threatened? For despite criticism by the press concerning recent setbacks in the courts in regard to press freedom,

there are strong indications that many Americans may favor tougher rather than fewer controls on the press.

The findings of a Gallup poll, which were reported recently at a meeting of media representatives attending the first in a series of planned First Amendment Congresses, indicate that of the 1,523 adults polled in a national survey those favoring stricter controls or retention of the present level of controls upon the press outnumber those who think controls are too strict by two to one. Further evidence that Americans may be taking their basic freedoms, as well as freedom of the press, too much for granted is seen in the finding by Gallup that three of every four persons polled were unfamiliar with the speech and press provisions of the first amendment.[5]

These startling findings come at a time many responsible journalists feel that the press's freedom under the first amendment to report information and discuss issues of general and public concern is being seriously eroded by a hostile and "imperial judiciary."[6] Jack C. Landau, executive director of the Reporters Committee for Freedom of the Press, commenting upon numerous joint press-bar efforts during the 1970's to foster a better understanding by both press and bar about press law problems, recently lamented:

> And what has been the result of all this reasonableness and moderation and discussion. They [the courts] have jailed our reporters. They have held our editors in contempt. They have fined our publishers. They have allowed our confidential investigative records to be seized en masse. They have permitted police in our newsrooms. They have allowed the secret seizure of our telephone calls. They have forced us to disclose our internal newsroom discussions and private thoughts. They have destroyed our journalist shield laws and our libel law protections. And at the same time, they have been trying to prohibit information about themselves from being made freely available to the public.

In the face of such seemingly hostile court actions, Landau said: "The press has no choice--as uncomfortable as this may be for many of us--but to fight back with every tool at our disposal."[7] Gallup's recommendations to the First Amendment Congress, meeting just a few days before Landau spoke, though less impassioned,

were much the same: Journalists should embark on a program designed "to raise the level of consciousness of the American public regarding their basic freedoms."[8]

How can journalists, faced by judges who seem more and more frequently to ignore the "fine distinctions" safeguarding first amendment freedoms and a public which has little understanding or interest in such distinctions, mount an effective campaign toward public enlightenment? One aspect of such an educational program, without doubt, is a rethinking and reexamination of first amendment theory. If the speech and press clauses are not to be read literally, "Congress shall make no law . . . abridging the freedom of speech or of the press," then what is the journalist's best means of safeguarding freedom of expression? It is clear that the balancing-of-interests approach taken by the Burger Court has allowed speech and press freedoms to be severely eroded during the 1970's. Embarking into the 1980's, how can the "firstness" of the first amendment, to borrow the phrase of one legal commentator,[9] be most effectively and persuasively articulated?

This paper will argue that there is a "preference for freedom"[10] which is profoundly rooted in United States history. Such a preferred position postulate, though grounded in the eighteenth century, was first articulated as a constitutional theory by the Supreme Court during the 1940's and early 1950's, and since that time its premises and assumptions have been espoused at or time or another by the overwhelming majority of the justices to serve on the Court.[11] And how a jurist regards speech and press freedoms, it has been argued, may be a determinant of how heavily the "judicial thumb" is weighted on the side of first amendment interests in the balancing-of-interests process.[12] The purpose of such weighting is not that the press, as an institution, should be free from all government restraint; it is rather that weighting affords protection for essential

societal values of interest to all. Maintenance of a system of freedom of expression, one prominent legal scholar contends, is necessary for four basic reasons: (1) as a method of assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by members of the society in social, including political, decision making, and (4) as a means of maintaining the balance between stability and change in the society.[13]

The general concept that the institutional press, as an element of that system of freedom of expression, serves in the public interest may be a matter of debate, but the contention that the press should serve the public interest is accepted by nearly everyone as a truism. Freedom of the press, according to William Hocking, a member of the Hutchins Commission on Freedom of the Press, "has always been a matter of public as well as individual importance."[14] While upholding the "public's right to know" has been widely argued as an essential role of the press,[15] such a utilitarian approach[16] may pose a definitional dilemma if the public interest and the interests of the communicator are considered one and the same.[17] And inherent in the utilitarian theory, as one Supreme Court justice has noted, is the reservation that "[t]here must be some point at which the government can step in."[18] It is this point at which the government can "step in" that the Supreme Court must ultimately determine.

Because of the complexity of the balancing-of-interests approach and the importance of safeguarding the various social values at stake in the speech and press guarantees, any simplistic interpretation or theory regarding first amendment rights is unlikely to serve a useful purpose. The preferred position doctrine, however, is far from a simplistic approach. Indeed, if the absolutist-literalist interpretation espoused by Justices Black and Douglas is no longer a viable argument for journalists, and if the balancing-of-interests approach as used by the Burger Court is playing havoc with first amendment freedoms, as many

journalists have indicated, then the preferred position doctrine appears to offer a viable middle-ground position and a needed corrective agent to the ad hoc balancing approach being pursued by the Court. The preferred doctrine's rich historical context, its various legal premises, and the implications involved in their application to recent Supreme Court opinions dealing with freedom of expression will be examined below.

I. DIVERGENT VIEWS OF THE FIRST AMENDMENT

Interpretation and theorizing about the speech and press clauses of the first amendment have been both divergent and confusing.[19] Legal scholars, as well as members of the Supreme Court, make frequent reference to the historical meaning of the language of the two clauses, each drawing interpretations compatible with the writer's legal philosophy. Alexander Meiklejohn, philosopher-educator and eminent first amendment scholar, takes an absolutist view. He notes:

> [N]o one who reads with care the text of the First Amendment can fail to be startled by its absoluteness. The phrase, "Congress shall make no law . . . abridging freedom of speech," is unqualified. It admits of no exceptions. To say that no laws of a given type shall be made means that no laws of that type shall, under any circumstances, be made. That prohibition holds good in war as in peace, in danger as in security.[20]

Meiklejohn, however, distinguishes between public expression concerned with matters of general public interest, for which absolute protection is essential, and private speech, which is more subject to regulation.[21]

Other legal scholars, however, interpret the first amendment as affording sufficient latitude for a careful balancing of speech and press rights with other governmental interests. Zechariah Chafee, Jr., former Harvard Law School dean and an influential exponent of the balancing-of-interests approach, has argued that the framers had "no very clear idea as to what they meant by 'the freedom of speech or of the press'" clauses.[22] A balancing-of-interests approach, for Chafee, does not necessarily rule out placing freedom of expression in a preferred position.

He notes that:

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion. . . . Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.[23]

While the essential precept of interest balancing is an objective weighing of all the facts, in practice the balancing doctrine "opens a broad door through which the judge's personal prejudices and misconceptions pass along with his legitimate and constitutional concerns."[24]

Another respected First Amendment theorist and legal scholar, Thomas I. Emerson, a long-time advocate of a balancing-of-interests approach based upon a careful distinction between "expression" and "action" and a delineation of the degree of social control allowed over each, has been critical of the balancing approach, even as applied by the Warren Court. Emerson noted that the Court's efforts to deal with novel or complex problems of first amendment law has "often floundered for lack of a satisfactory theory." Failure to develop a comprehensive theory of the first amendment, Emerson writes, left the Court "without satisfactory tools to deal with many new developments that are emerging in the system of freedom of expression. This has resulted in a constant shifting of positions, leaving the lower court, public officials, and private citizens "in a state of confusion over the applicable rules."[25] Emerson concluded that:

> No system of freedom of expression can succeed in the end unless the ideas which underlie it become part of the life of the people. There must be a real understanding of the root concepts, a full acceptance of the guiding principles, and a deep resolve to make the system work. This state of affairs can be reached only if we succeed in building a comprehensible structure of doctrine and practice that is meaningful to all and meets the needs of a free society. The task remains largely unfulfilled.[26]

Ten years after the publication of Emerson's scholarly treatise on freedom of expression, that task still "remains largely unfulfilled."

There can be little question but that the absolutist-literalist position, which failed to win the endorsement of even the majority of the more liberally-oriented Warren Court, must be ruled out as a viable first amendment theory for the 1980's. And, if the Warren Court failed to develop a satisfactory balancing-of-the-interests approach, as Emerson believes it did, the record of the Burger Court in the first amendment area during the 1970's has further encouraged many lower courts to abuse any guardianship they might have exercised in judiciously weighing expression guarantees against competing governmental and/or private interests. It is in this context that the preferred position postulate requires reexamination.

II. THE PREFERENCE FOR FREEDOM APPROACH

The preferred position postulate is usually attributed to a footnote appended to an opinion written by Justice Stone in a 1938 Supreme Court case, United States v. Carolene Products.[27] This "embattled footnote"[28] contained three basic premises: (1) That when legislation on its face appears to violate specific Bill of Rights guarantees, the normal presumption of constitutionality is weakened, (2) that the judiciary has a special function as defender of these basic freedoms perceived as being necessary to the operation of the democratic process, and (3) that the Court should offer special protection to minorities through more searching judicial inquiry since such unpopular groups are unlikely to be able to protect themselves through the normal political processes.[29]

While the now-celebrated footnote in Carolene may have provided the catalyst for the Court's later articulation of the preferred position doctrine, the footnote was not the origin of the preferred freedom concept. Two observations need to be made about this misconception: (1) The footnote itself did not contain the

words "preferred position," and four years later when Justice Stone, then the Chief Justice, first wrote of a "preferred position" for speech and press freedoms he did not tie the concept to his earlier Carolene footnote[30] and (2) the twin concepts central to the first amendment preferred position theory--the grading or ordering of Bill of Rights guarantees and the primacy of freedom of expression and thought--can both be unmistakably traced to the period before 1791 when the first amendment was finally ratified.[31]

A. A Brief Historical Perspective

When the first Congress convened in the Spring of 1789 it was James Madison, as leader of the House of Representatives, whose enterprise and responsibility it became to assemble the various state Bill of Rights proposals, organize them into some rational order, and guide them through the Congress. During the previous year, Thomas Jefferson, then representing the United States in France, had often exchanged views with Madison about the need for a Bill of Rights. This correspondence, plus Madison's pleadings about the Bill of Rights before the House as reported in the Annals of Congress, have been examined by one first amendment scholar who sees there both a willingness to classify and grade the various provisions as well as a firm conviction by the framers that the "freedoms embodied in the First Amendment must always secure paramountcy."[32] Madison, for example, in presenting Bill of Rights proposals to the House classified the rights in order to distinguish the American problem from the English experience with the Magna Carta.[33] Justice Black, in his first majority opinion in the first amendment area after joining the Supreme Court, forcefully restated this awareness of the framers:

> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed.[34]

Not only were the freedoms embodied in the first amendment given "paramountcy" by Madison, he explicitly informed the First Congress that the sponsors of the Bill

of Rights expected the judges to "consider themselves in a peculiar manner the guardians of those rights." Madison told the House in 1789:

> If they [the rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[35]

It was to be more than a century later, however, before justices of the Supreme Court had the opportunity to exercise such guardianship in regard to the first amendment.[36] Indeed, it was not until the landmark Schenck v. United States case[37] immediately following World War I that the Court began a genuine analysis of the scope and meaning of the speech and press clauses of the first amendment. Justice Holmes, writing for a unanimous Court in Schenck, held that when first amendment rights are involved an otherwise permissible governmental restriction must be examined in a different context.[38] It can be argued that Holmes' "clear and present danger test" enunciated in Schenck, by placing a more critical standard upon the exercise of judgment about the protection of first amendment freedoms, focuses upon the essence of the preferred position postulate.[39]

A few months after Schenck, Justice Holmes, in espousing his "free trade of ideas" theory reflecting a Miltonian faith in freedom of expression, made an eloquent plea for a preferred position for expression in an open marketplace for testing truth. Holmes wrote:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[40]

Numerous other examples of judicial articulation of a preferred position for speech and press can be enumerated prior to the embattled Carolene footnote.[41]

Eighteenth century precedent, of course, does not control the Court's jurisprudence in the twentieth century, but it can and does afford guidance. Indeed, the preferred position theory, along with the clear and present danger test, was frequently used by the Supreme Court during the 1940's and early 1950's.

B. Development of the Judicial Doctrine

The judicial development of the preferred position doctrine, as noted above,[42] has frequently been tied with Justice Stone's Carolene footnote, but eighteen months were to pass before that "tentative and qualified pronouncement," as one source noted, "leaped from the footnotes" to become the explicit doctrine of the Court.[43] Justice Roberts, writing for an almost unanimous Court in Schneider v. Irvington, said:

> In every case . . . where legislative abridgement of the right [to freedom of speech and press] is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.[44]

As in the Carolene footnote, Justice Roberts still did not use the actual term, "preferred position." That term was first used by Justice Stone, then the Chief Justice, in an opinion written four years after Carolene. In making the sweeping statement below, the Chief Justice, dissenting, made no reference to his earlier footnote in Carolene. He wrote:

> The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a preferred position.[45]

A year later Justice Douglas restated the Chief Justice's position, this time for the Court's majority, noting that:

> A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the

> wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.[46]

The "preferred position" concept was applied in a number of opinions during the 1940's and 1950's.[47] Justice Rutledge, however, offered perhaps the strongest statement of the preferred position doctrine in 1945, when he wrote:

> The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation . . . will not suffice. These rights rest on firmer foundation. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . . where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and sanction not permitting dubious intrusions.[48]

C. Decline of the Preferred Doctrine

The libertarian approach taken by Justices Stone, Murphy, Rutledge, Douglas, and Black in espousing the preferred position doctrine during the 1940's and early 1950's was not without its critics. The doctrine's chief critic on the Court was Justice Frankfurter who denounced the preferred position as "a mischievous phrase" and made the clearly mistaken claim that the doctrine had never commended itself to a majority of the Court.[49] But as one legal scholar has pointed out, if Justice Frankfurter intended to reject the primacy of the first amendment, his Kovacs v. Cooper credo statement can be read "as one of the most eloquent testimonials to the vitality of the preferred position concept."[50] Frankfurter, after reviewing the history of the preferred position doctrine, wrote:

> [W]ithout freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.[51]

Justice Frankfurter, a strong advocate of the balancing-of-interests approach, objected to the preferred position doctrine because he felt its use would result in a "mechanical jurisprudence" arrived at through the use of "oversimplified

formulas."[52] Justice Jackson had earlier expressed a similar view, warning that the use of such "formulistic solutions" would bring about the same fate for civil liberties as had been brought about for constitutional laissez faire, "which was discredited by being overdone."[53] One commentator has pointed out that both Justices Frankfurter and Jackson, rightly or wrongly, were convinced that the preferred position was merely a label for "a novel, iron constitutional doctrine, clearly the views of Meiklejohn."[54]

Although the majority of the Supreme Court justices through the 1950's had, in one opinion or another, endorsed the preferred position concept,[55] Justice Frankfurter's attack on the doctrine in Kovacs and the almost simultaneous deaths of Justices Murphy and Rutledge that same year, curbed the frequency of doctrine's use. Indeed, the Court's more general approach came to be a "studious avoidance" of the phrase.[56]

D. Utility of the Preferred Postulate

If the preferred position approach to speech and press freedom went into decline in the late 1950's, the central postulate of that doctrine did not. It is that in the balancing-of-interests approach, speech and press interests, being so basic and vital to the exercise of the political freedoms protected by the first amendment, should be placed in a preferred position in the judicial weighing process. Or, in the terms of the doctrine flowing from the Carolene footnote, the "presumption of constitutionality" afforded legislation in other areas should be narrower in scope as applied to governmental restrictions on speech and press. Since its Near v. Minnesota decision in 1931,[57] the Supreme Court has taken such a preferred position approach almost routinely in dealing with prior restraints on freedom of speech or of the press. In the Pentagon Papers case,[58] for example, the Court said: "'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' . . .

The Government 'thus carries a heavy burden of showing justification for the enforcement of such a restraint.'"[59] A libertarian such as Justice Douglas would impose much the same conditions even in areas where prior restraint is not involved. Dissenting in Branzburg v. Hayes,[60] Douglas wrote:

> The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.[61]

And Chief Justice Burger, though he doesn't use the phrase, "preferred position," has written to that effect in regard to first amendment protection of the editorial function performed by journalists. In Miami Herald Publishing Co. v. Tornillo,[62] for example, the Chief Justice wrote:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials--whether fair or unfair--constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.[63]

The preferred position doctrine has not been and need not be limited to the concept of narrowing the presumption of constitutionality as enunciated in the Carolene footnote.[64] There are, in fact, a number of approaches and devices used by the Supreme Court through the years, if employed separately or in combination, would enable the Court to safeguard a constitutionally mandated preference for freedom of speech and of the press. Among these utilitarian measures are: (1) strict prohibition against the governmental exercise of prior restraints on expression, as noted above, (2) the continued employment of the clear and present danger test, a concept developed in tandem with the preferred position doctrine,[65] (3) maintenance of the constitutional privilege provided by the Court in New York Times Co. v. Sullivan[66] and its progeny to safeguard the "uninhibited,

robust, and wide-open" debate upon public issues envisaged by the Court, and (4) maintenance of generally higher standards for procedural due process where basic speech and press freedoms are involved.

Such procedural safeguards include exercise of the overbreadth and vagueness doctrines in construing and ruling upon the constitutionality of statutes limiting first amendment freedoms, the careful enunciating of provisions in regard to burden of proof, for example, the "convincing clarity" standard of the New York Times rule applicable to libel,[67] and relaxation of the requirement of standing to take legal action where first amendment issues are involved. These measures are all involved in a broad construction of the preferred position concept. The application of these aspects of the preferred position doctrine to the on-going balancing-of-interests approach being taken by the Burger Court will be examined in Section IV below.

The concept of preference has recently been raised with increasing regularity in regard to the interrelatedness of the speech and press clauses of the first amendment. The proliferating dialogue threatens to engulf the attention of legal scholars and tends to diffuse attempts toward a sharper delineation of far more important and fundamental preferred freedom issues.

III. IS FREE PRESS PREFERRED OVER FREE SPEECH?

A. Protection for the Institutional Press

In 1974 Justice Potter Stewart, in a Yale Law School Sequicentennial Convocation address, stated that the first amendment explicitly and purposively provides protection for the press which is independent from that provided to others under the speech clause. He explained that:

> [T]he Free Press guarantee is, in essence, a structural provision of the Constitution. Most of the other provisions of the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory

> self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.[68]

Justice Stewart noted that cases coming to the Supreme Court during the first fifty years after the first amendment had been extended to the states dealt primarily with "the rights of the soapbox orator, the noncomformist pamphleteer, the religious evangelist," but seldom with the rights, privileges, or responsibilities of the organized press.[69] More recently, however, cases involving the established, institutional press finally reached the Court--cases dealing with public libel, the right to protect confidential sources, the right to publish government documents without prior restraint, questions of access to the print and broadcast media. The Court's approach to these questions, Justice Stewart said, has been based upon the assumption that the press as an institution has constitutional protection. He explained:

> This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They <u>are</u> guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.[70]

Not only is the press afforded protection as an institution, the first amendment also protects the "institutional autonomy of the press," Justice Stewart said. The press clause's primary purpose was to create "a fourth institution outside the Government as an additional check on the three official branches."[71] And, Justice Stewart pointed out, "So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can."[72] But this autonomy "cuts both ways." He noted that:

> The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constituional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee

of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.[73]

During the past five years, Justice Stewart's brief speech has spawned numerous law review articles and commentary examining the speech-press issues which he addressed.[74] The speech has also brought an examination of Justice Stewart's Court opinions. Floyd Abrams, counsel for media defendants in Herbert v. Lando,[75] a $44 million libel action brought against CBS, Mike Wallace, and Barry Lando as the result of a "60 Minutes" program segment, views Justice Stewart's judicial opinions, both before and after the Yale address, as echoing similar first amendment themes.[76] Indeed, Justice Stewart's views in cases involving the press are seen as being closer to those of Justice Douglas than to any member of the Court today.[77]

Chief Justice Burger, however, in a concurring opinion in First National Bank of Boston v. Bellotti,[78] went out of his way to assure the press that it had no special first amendment rights. In Bellotti the Court, ruling that all corporations have the same rights of free speech, held that a Massachusetts statute prohibiting corporate "issue" advertising was unconstitutional. Justice Powell, writing for the Court, was joined by both Justices Stewart and Burger. It was therefore unnecessary, as one commentator points out, for the Chief Justice to go to the lengths which he did in an attempt to upset Justice Stewart's Yale Law School thesis.[79]

The Chief Justice first pointed out that he did not believe there is an historical basis for making a distinction between the speech and press clauses of the first amendment.[80] While acknowledging that certainty on this point was not possible, he thought that "the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege." The Chief Justice also saw a fundamental problem with defining that part of the press to be afforded special protection. He viewed the task of including some entities within the

"institutional press" while excluding others as contrary to the Court's approach in such cases as Lovell v. Griffin,[81] Pennekamp v. Florida,[82] and Branzburg v. Hayes.[83] "In short," the Chief Justice concluded, "the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms."[84]

A few days after the Belotti concurrence, which got national publicity in the press, the Chief Justice wrote the opinion for a unanimous Court in Landmark Communications, Inc. v. Virginia,[85] a holding which was a victory for the press, one of the few during the session. The Court held that the state may not penalize the press for reporting facts concerning a confidential judicial commission investigation since the publication Virginia sought to punish "lies near the core of the First Amendment." The Chief Justice wrote:

> [T]he article published by Landmark provided factual information about a legislatively authorized inquiry pending before the Judicial Inquiry Commission and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.[86]

Chief Justice Burger made it clear that though the press might not be punished, the state could punish other participants for breach of the statute.[87] In other words, a distinction in the protection afforded under the speech and press clauses in regard to violating the Virginia statute appears to have been acknowledged by the Chief Justice.

Justice Stewart, in a short four-paragraph concurring opinion, took the opportunity to reiterate his Yale speech theme that the press does have greater first amendment rights than others. He wrote:

> If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming.[88]

To say that the Chief Justice's Landmark and Bellotti opinions are inconsistent is to state the obvious. If it is constitutional to punish those who leak information about a judicial proceeding to the press, but unconstitutional to punish the press for printing it, the result of the Landmark holding, it must be because protection under the speech and press clauses differ, at least in degree. But this is a distinction which the Chief Justice appears to deny in his Bellotti concurrence. Ambiguity concerning the meaning and scope of the speech and press clauses, as will be indicated below, is not limited to the judiciary.

B. Implications of the Speech-Press Question

The ongoing debate concerning the interrelatedness of the speech and press clauses resulting from Justice Stewart's Yale Law School address has serious implications in regard to the functioning of a free press in the 1980's. While many aspects of the argument go beyond the scope of this study, a few observations are relevant to the preferred position doctrine. On the question of the historical origin of the speech and press guarantees, for example, one legal scholar has observed that "the Framers have left us language in the first amendment which justifies the present debate--language which, under almost any view one takes, is less than clear."[89]

Floyd Abrams, after acknowledging that ambiguities exist about the meaning of the press clause, observed that:

> Whatever other conclusions may be drawn--and disputes engaged in--from the history of the adoption of the press clause of the first amendment, one thing is clear: The press clause of the first amendment was no afterthought, no mere appendage to the speech clause. The press clause was not, the views of Chief Justice Burger to the contrary, merely "complementary to and a natural extension of Speech Clause liberty."[90]

And Melville Nimmer, noting that if the speech clause is held to refer to all forms of expression, then the press clause would be a meaningless redundancy, concluded that "freedom of the press as a right recognizably distinct from that of freedom of speech is an idea whose time is past due."[91]

On the other hand, Anthony Lewis, a New York Times newsman and syndicated columnist, takes issue with Justice Stewart's conclusion that the eighteenth-century concept of freedom of the press applied exclusively to the institutional press. While acknowledging that the precise motives of those who drafted the speech and press clauses are unlikely to be discovered, Lewis concluded that:

> The most natural explanation seems the most probable: The framers wanted to protect expression whether in unprinted or printed form. Freedom of the press was more often mentioned in colonial and state bills of rights than freedom of speech; at the time of the first amendment ten state constitutions protected the former while only two the latter. . . . But the two phrases were used interchangeably, then as now, to mean freedom of expression.[92]

Another legal scholar, quoting Chafee that the "truth is, . . . the framers had no very clear idea what they meant," concluded that it was unlikely the press clause could have been meant to protect the institutional press alone, as suggested by Justice Stewart. He observed, however, "that the conceptual unity of the speech and press evident in colonial times is less easily defended today."[93]

The implication of this statement argues for both a preferred position for the function of the press while at the same time grounding such a privilege claim in the broader sweep of the speech clause's guarantee of freedom of expression and thought. There is little doubt that the soapbox orator, the politician, the evangelist, or the civil rights activist faces a far more complex problem today in disseminating his or her message to the general public than was true of similar activities in Colonial America. The growth of the institutional press--group and corporate newspapers, national magazines, radio, and television--has increased the importance of the press in Holmes' marketplace of ideas. Indeed, the medium may be as important as the message; one educator has even suggested that the medium is the message.[94] While the speech clause continues to protect the message of the syndicated columnist and the broadcast commentator as well as the soapbox orator, the medium of communication is protected by the press clause.[95]

The implication of the speech-press debate is that the first amendment need not be read to grant special rights only to those engaged in institutionalized communication. One writer argues that:

> What it should protect is not the institution, but the role of the press: To afford a vehicle of information and opinion, to inform and educate the public, to offer criticism, to provide a forum for discussion and debate, and to act as a surrogate to obtain for readers news and information that individual citizens could not or would not gather on their own. A special guarantee for freedom of the press should apply not simply to those whom a court might label "press" but to whomever, of whatever size, by whatever means, regularly undertakes to fulfill the press function.[96]

Anthony Lewis points out that the whole idea of treating the press as an "institution" arouses uneasy feelings. The press needs to maintain its autonomy, as Justice Stewart noted in his Yale Law School address. But it is also true that in the American system institutions are too often subject of external checks and regulation. Chief Justice Burger, writing for the majority in Nebraska Press Ass'n v. Stuart, said:

> The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly--a duty widely acknowledged but not always observed by editors and publishers.[97]

A more persuasive argument, however, might be made for a preferred position for freedom of expression encompassing both speech and the press. Robert H. Bork, a professor of law and former solicitor general of the United States, takes such a position, arguing that both the speech and press clauses are in a preferred position because of their intimate relationship to the ways in which a democracy operates. He writes:

> That preferred position rests upon grounds so strong that they could properly have been inferred by judges from the structure of the entire Constitution, even if no First Amendment had ever been adopted. The Constitution prescribes in great detail a representative democracy, which is to say government resting upon the choice of the electorate. That form of government makes no sense, even without a First Amendment, unless speech and writing critical of government are freely permitted, and unless the electorate is able to make itself informed. That theory requires great freedom for both speech and press; it does not require absolute freedom

in all circumstances. To insist that it does is to lose the intellectual argument before it has begun.[98]

Bork's approach might avoid one of the specter's raised by critics of Justice Stewart's call for protection for the institutional press--the danger inherent in defining such a press. It also tends to lessen another danger Bork sees, the invitation which special recognition might bring to regulate the press as a corporate institution. "Our economy is badly overregulated," Bork notes, "and it would be an even greater disaster if speech and press freedoms came under similar controls."[99] Such a danger is enhanced to the extent that the press is perceived as being a center of irresponsible power, Bork believes.[100] Another legal scholar warns that "the critics will be handed a weapon forged by the press itself every time it seeks to extend press entitlements as the surrogate of the public right to know."[101]

Despite such warnings, however, protection for the editorial function of the press often demands that the press seek privileges not extended to the public generally. In no area has that need been more acutely apparent, and unsuccessful, than in the claim for a constitutional protection for newsgathering.

C. Linkage of Speech-Press Claims in Access Context

One court has noted that the function of the press is tripartite in nature: (1) reporters must have the means of acquiring information, (2) the information must be edited and processed, and (3) the information must be disseminated.[102] The dissemination of news, fortunately, has long been accorded constitutional protection.[103] In regard to the other two processes, as noted by one legal authority, the right to gather information is by no means as sweeping as the right to publish once the journalist comes in possession of information.[104]

Chief Justice Burger has, upon at least two occasions during the 1970's, explicitly, if grudgingly, upheld the editorial function of newspaper and broadcast

journalists.[105] More recent decisions by the Court have reiterated that the right to publish truthful information of general public interest and concern which has been legally acquired is within the scope of editorial protection afforded by the first amendment.[106]

If the right to publish and to disseminate information once acquired is generally in a preferred position, why is it that newsgathering, at best, enjoys only a qualified protection?[107] Three recent cases dealing with access to jails and prisons for newsmen indicate that one primary limiting factor has been the Court's linkage of the journalist's claim to access under the press clause with the right of access afforded the public generally.

Justice White, writing to deny newsmen a first amendment based testimonial privilege in Branzburg v. Hayes in 1972, provided a dictum which has been utilized by the Court in later access decisions. White wrote that "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[108] Two years later in Pell v. Procunier[109] and Saxbe v. Washington Post Co.[110] the press attempted to establish a first amendment right to gather news within state and federal prisons. Justice Stewart, writing for the Pell Court, after citing Justice White's Branzburg dictum, held that, "Similarly, newsmen have no constitutional right of access to [state] prisons or their inmates beyond that afforded the general public."[111] Relying on Pell, the Saxbe Court held that a similar policy of the federal prison system which permitted press interviews only with individually designated inmates in minimum security facilities did not abridge press freedom.[112]

As a matter of fact, in both Pell and Saxbe, as the Court pointed out, the press had been granted substantial access beyond that afforded the general public,[113] and there was no evidence that officials had attempted to conceal prison conditions.[114] Four years later the Court in Houchins v. KQED, Inc.[115]

had the opportunity to rule in a case in which the press had been absolutely barred by informal administrative policy from investigating conditions at a California county jail where a prisoner had committed suicide. But a badly divided Court, in a decision participated in by only seven justices who wrote four separate opinions, again denied access to journalists, linking the denial once again with the degree of access provided to the public generally.

Chief Justice Burger, in an opinion joined by only Justices White and Rehnquist, while acknowledging that prison conditions were a matter "of great public importance" and that the press had traditionally played a powerful role in informing the public about the operation of public institutions, argued that these facts afforded no basis

> for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.[116]

Justice Stewart, concurring, disagreed with the rationale of the plurality opinion. Like the Chief Justice, Stewart did not question the application of Pell and Saxbe, but he argued that the concept of equal access must be accorded more flexibility. He wrote:

> Whereas he [The Chief Justice] appears to view "equal access" as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.[117]

Justice Stevens, in a strong dissent running almost twice the length of the plurality opinion, joined by Justices Brennan and Powell, argued that Pell and Saxbe should not be controlling since those decisions dealt with situations where the press had been granted substantial access. Sheriff Houchins, on the other hand, had arbitrarily prohibited all press and public access at the time KQED filed suit.[118]

The lack of consensus among even a majority of the seven justices taking part in the Houchins opinion leaves the issue of the constitutional protection for newsgathering in governmental facilities in question. Since only three justices joined in the whole of the opinion, it may be destined to have only limited precedential value. A preferred position approach, as noted by Justice Stewart, demands more flexibility in prison access regulations to accommodate the essential function of newsgathering. The recent take over of the New Mexico State Penitentiary and the resulting carnage of inmate against inmate and the widespread destruction of public property only heightens the access argument. To hold that everyone has a right of access denies the societal function of the press. Houchins is a much too narrow balancing-of-interests approach.

IV. APPLICATION OF THE PREFERRED POSITION APPROACH

Any argument that the courts should return to the preferred position doctrine of the 1940's and 1950's is sure to be viewed with some skepticism, but such a proposition is not as novel as it might seem. Martin Shapiro, a political science professor and author of numerous law review articles and books on the law and politics, made such a recommendation in reference to the Supreme Court more than a decade ago. Commenting upon the "instinctive horror" which is often associated with "going backward" in the advocacy of constitutional doctrine, Shapiro wrote:

> In part it is undoubtedly due to a residue of belief in the idea of progress that should have disappeared, but did not quite do so, when our total commitment to the enlightenment philosophy that underlies the idea wavered. In part, going back affronts the notion of a gradually developing and self-purifying common law which is still bred into lawyers along with the notions that legislators--not judges--and statutes--not judicial opinions--are and should be the central font of our law.[119]

However reluctant the Court may have been to apply the preferred position doctrine during the 1960's and 1970's, this does not rule out its applicability

today. Nor does it indicate that the preferred position doctrine would not have utility in the balancing-of-interests approach taken more often than not by the Burger Court. And, as noted above,[120] a modern-day espousal of the preferred position doctrine need not be limited to the narrow presumption of constitutionality concept flowing from the Carolene footnote. There are, in fact, a number of devices used by the Court through the years which have complemented the preferred freedoms approach. The implications of such an approach in regard to recent Supreme Court opinions in four different contexts will be examined below.

A. In Avoiding Prior Restraints

Freedom from government imposed censorship of communication prior to its initial publication has long been held to be protected by the first amendment.[121] Though not every prior restraint of expression constitutes a violation of the first amendment,[122] the approach taken by the Supreme Court in such cases places freedom of expression in a preferred position in any balancing of interests engaged in by the judiciary. In its per curiam decision in the Pentagon Papers case, for example, the Supreme Court, quoting Bantam Books, Inc. v. Sullivan,[123] noted that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[124] And quoting Organization for a Better Austin v. Keefe,[125] which had been decided a few weeks earlier, the Court concluded that the "Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" This, the Court held, the government had failed to do.[126]

It has been suggested that the different treatment of prior restraint as opposed to subsequent punishment reflects a particular legal rationale.[127] This rationale is tied to the historical concept of prior restraint being imposed by administrative tribunals bent upon acts of suppression. Administrative systems

of prior restraints, therefore, are generally found unconstitutional by the Court unless various procedural safeguards are taken to safeguard expression, for example, a guarantee of prompt judicial review.[128] But more recently the doctrine has also been applied to judicially imposed restraints, for example, the Pentagon Papers case and instances involving judicial restrictive orders.[129]

But even in the area of prior restraint, the presumption of invalidity does not mean that the balance of interest will always result in the protection of freedom of expression. While it is true that the media can point to victories, for example, an Oklahoma state court injunction prohibiting the news media from publishing the name or photograph of an 11-year-old boy who was being tried before a juvenile court was struck down since the truthful information was "publicly revealed" or "in the public domain."[130] And after a delay of six months, Progressive magazine was finally allowed to publish an article which the government argued contained secret information critical to the construction of a hydrogen bomb.[131] Prior restraint on expression, however, continues to occur.

The Court, for example, sometimes disagrees on whether or not an action limiting expression constitutes a prior restraint. In Pittsburgh Press Co. v. Pittsburgh,[132] for instance, the Court upheld an ordinance forbidding newspapers from carrying "help wanted" classified ads in sex-designated columns. In so doing, the Court's majority rejected Chief Justice Burger's dissenting view that the Commission's cease and desist order constituted a prior restraint.[133] And in the obscenity area where prior restraint against the dissemination of such materials has been justified by holding that obscene expression is not protected by the first amendment,[134] the Court recently went further in upholding the prior restraint of "indecent words," language not falling within the definition of obscene expression, as being within the authority of the Federal Communications Commission.[135]

Despite the strong mandate afforded by the "heavy presumption" test applicable to most prior restraints, press freedom is being seriously eroded in the fair trial-free press area. One of the problems may be that the balancing-of-interests doctrine is being applied by one of the parties to the controversy. But the press must also acknowledge that sixth amendment fair trial guarantees are set forth in language just as explicit as are those protecting speech and press in the first amendment. The balancing of interests between first and sixth amendment rights is, at best, a delicate operation. Perhaps the advice of Justice Frankfurter might best serve as a balancing guide for today's Court. He wrote:

> A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.[136]

Although the Court held in 1976 that the use of judicial "gag" order could be justified only under very limited circumstances,[137] the lower courts have continued, with some regularity, to gag both the journalist and his sources of information about various aspects of the judicial process.[138] Earlier the Supreme Court refused to grant certiorari in Dickinson v. United States,[139] a case dealing with a judicial gag order against the press which had been ruled invalid but which the U.S. Court of Appeals, Fifth Circuit, ruled still has to be obeyed until it could be reviewed. In effect, the decision allowed an effective prior restraint based upon an invalid order to deny coverage of an ongoing trial, at least during the period of the proposed review.

More recently, in Garnett Co., Inc. v. DePasquale,[140] the Court virtually ignored first amendment interests in upholding the barring of the press and the public from pre-trial hearings. Though the decision was based primarily upon sixth amendment grounds, not on whether the press has a right to attend trials

under the first amendment,[141] the decision has played havoc with press efforts to inform the public about judicial proceedings.[142] Though the Gannett case did not deal with prior restraint per se,[143] the effect of the holding is no different than that of judicial "gag" orders against non-media sources of information relied upon by the press for news of the judicial process. Clearly Justice Frankfurter's balancing formula has been ignored in favor of a preferred position, not for the first amendment, but for sixth amendment rights.

B. In Utilizing Clear and Present Danger Test

The clear and present danger test, first espoused by Justice Holmes in Schenck,[144] has had a long and checkered judicial history. There is little argument that application of the danger test has the potential for placing freedom of expression in a preferred position. Though the test has had only limited success through the years, being used only irregularly, it played an important role during the 1937-1951 period. One legal scholar, noting that while first amendment rights were upheld in a substantial number of cases during this period in which the danger test might have been applied but wasn't, the test was specifically relied upon to uphold freedom of expression in at least nine cases.[145]

In 1951, however, the Supreme Court all but destroyed the effectiveness of the danger test by recasting the elements to be taken into account in a way which drastically lessened Justice Holmes and Justice Brandeis' emphasis upon the immediacy of the danger. In Dennis v. United States[146] the Court adopted language used by Judge Learned Hand in his Second Circuit opinion which held that in each case the courts must ask "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[147] The Court's majority, in effect, turned the clear and present danger into a clear and "probable" danger test.[148]

Six years after Dennis, however, the Court tended to resurrect the criterion of imminence which it had revoked in Dennis by subscribing to an "incitement test" which focused more on the substance of expression rather than on the circumstances under which it was communicated.[149] Then four years later in Brandenburg v. Ohio,[150] the Court joined the incitement test to the clear and present danger doctrine.[151] The courts, in other words, are to focus on both the character of the defendant's expression as well as on the circumstances under which it was made.[152]

Despite the troubled history of the clear and present danger test, and despite predictions that the test has been or will be abandoned by the Court, the concept still appears to be a viable first amendment doctrine.[153] Abridgement of expression by the state because of its content still requires evidence establishing both the clarity of the danger in terms of its potential for incitement and a showing of a presence or imminence that the advocacy will produce unlawful action.

In Landmark Communications, Inc. v. Virginia,[154] for example, the Supreme Court held that the first amendment forbade criminal punishment of third persons who are strangers to an inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of a judicial review commission despite reliance by the Virginia Supreme Court on the clear and present danger test. Chief Justice Burger, while expressing doubt as to the relevance of the danger test in resolving the problem, nevertheless made an orthodox application of the test.[155]

Earlier, however, in his Nebraska Press opinion, the Chief Justice had used Judge Learned Hand's "gravity of the evil" concept as set out in Dennis in defining clear and present danger,[156] leaving some doubt as to how the danger test will be used by the Court in the future. But the fact remains, the Supreme Court

is still using the danger test as espoused by Justices Holmes and Brandeis, or the more contemporary incitement test of Brandenburg, in various first amendment cases.[157] The lower courts are also utilizing the test.[158] The continued use of the danger and incitement tests in the balancing-of-interest approach being taken by the Burger Court can only help to advance the preferred position status of speech and press guarantees.

C. In Safeguarding the Times "Actual Malice" Rule

The constitutional libel privilege established by the Supreme Court in 1964 can be viewed as a substantive judicial doctrine enhancing the position of the press to engage, with increased impunity, in the "uninhibited, robust, and wide-open" debate on public issues envisaged by the Court. In New York Times Co. v. Sullivan the Court held that:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages from a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[159]

This federal rule was extended to "public figures" three years later[160] and finally to include private persons if the statements concerned matters of general or public interest.[161]

A decade after the federal "actual malice" rule was established, however, its broad protection is viewed by some as being seriously eroded by a revisionist Court. In 1974, for example, the Supreme Court essentially reversed its Rosenbloom private person decision, holding that any first amendment protection afforded news media against defamation actions by public officials and public figures should not be extended to defamation actions by private persons even though the published statements concerned issues of public or general interest.[162] Recent decisions also have tended to restrict the definition of public figure, thereby affording less protection to media libel defendants.[163] A more substantial

threat to the preferred status afforded debate on public issues under the federal "actual malice" rule, however, may be a recent case dealing with the question of what should be the proper boundaries of pre-trial discovery in libel cases falling under the federal rule.

The crucial question, which involved the scope of the journalist's exercise of editorial discretion, arose from a $44 million libel action brought as the result of a CBS broadcast in 1973, a segment of that network's award-winning "60 Minutes" program. Justice White, writing for a six-member majority in Herbert v. Lando, reversed the lower court,[164] noting that the "actual malice" standard itself, by requiring public officials and public figures to prove knowing or reckless falsehood to collect damages, provided an adequate balance between a libel plaintiff's reputational interest and the first amendment's guarantee of a free press.[165] The Court reasoned that compelling disclosure of the beliefs and conversations of editors and reporters would not unconstitutionally chill editorial decision making.[166]

Justice Powell, concurring, would give first amendment considerations more preference, particularly in disputes about the relevance of specific discovery questions.[167] Justice Brennan, dissenting in part, agreed with the majority in rejecting a privilege against inquiry into a reporter's mental processes, but he urged a qualified constitutional privilege to protect "pre-decisional communications" in the newsroom.[168] Justice Marshall, dissenting, argued for an absolute privilege against discovery of "the substance of editorial conversation," but he agreed with the majority that individual "state of mind" inquiries were virtually mandated by the "actual malice" standard.[169] Justice Stewart dissented because he did not think discovery questions concerning the editorial process were relevant in public figure libel actions.[170]

The controversial Herbert opinion brought what one justice labelled a "firestorm of acrimonious criticism" from the press.[171] It may well be, as one jurist and law professor has pointed out, that although the Herbert decision requires the defendant in a libel action to testify as to "the operation of his mind," it does not necessarily follow that the defendant is likely to admit that he harbored serious doubts as to the truth of the statements published.[172] A more preferred position approach, however, would have been that suggested by Justices Brennan and Marshall, protecting from the discovery process "pre-decisional communications" which occur in the newsroom. Otherwise, how can editorial discretion adequately be safeguarded?

D. In the Maintenance of Procedural Safeguards

In examining the premise that freedom of expression stands in a preferred position in any judicial balancing-of-interests approach, procedural as well as substantive considerations are of importance. Application of the preferred position doctrine requires that generally higher standards of procedural due process be maintained where speech and press freedoms are in jeopardy. Likewise, narrowing the presumption of constitutionality through the application of such constitutional doctrines as vagueness and overbreadth and relaxation of the requirement of standing to sue where first amendment issues are involved would all be consistent with the preferred freedoms goal.[173]

A statute is said to be defectively overbroad when it proscribes activities which are constitutionally protected--for example, speech and press activities--as well as activities which are not, such as the conduct aspects of picketing.[174] The vagueness doctrine, which has its roots in the notice requirements of due process, holds that a statute must be drawn with enough clarity and specificity that people will be sufficiently apprised of what is expected of them. One of

the on-going problems with legislating to regulate obscenity, for example, is the requirement of specificity under the Supreme Court's Miller v. California decision.[175] Justice Brennan pointed out in Miller that obscenity legislation has long been characterized by inherent qualities of vagueness and overbreadth.[176]

In the first amendment context, in contrast to other areas of law, the Supreme Court has permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that in fact his specific conduct was protected.[177] The reason for the special rule in the first amendment area, according to the Court, is that an overbroad statute might serve to chill "fragile" first amendment interests.[178] And, the Court has noted that: "The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted."[179] The prohibition against vagueness, likewise, carries with it both a substantive command as well as a note of imperativeness when applied to statutes which may impinge upon first amendment guarantees.[180]

Where first amendment freedoms are threatened, it has been argued, the most exacting measure of procedural due process must be prescribed if such freedoms are to be safeguarded.[181] It is not surprising, therefore, that the procedural difficulties at the core of several recent court decisions have tended to heighten the controversy between the press and the courts. While an explication of all of these decisions is beyond the scope of this paper, the following questions illustrate three recent procedural concerns.

(1) Newsroom Searches

Why allow the newsroom of a newspaper to be searched for information relevant to a criminal investigation, even though the newspaper and its personnel are innocent parties?

This question was posed in Zurcher v. Stanford Daily.[182] The U.S. District Court had ruled that a warrant search is permissible "only in the rare circumstance where there is clear showing that (1) important materials will be destroyed or removed from the jurisdiction; and (2) a restraining order would be futile."[183] The Ninth Circuit affirmed.[184] The Supreme Court, in answer to arguments from the newspaper and journalists that surprise warranted searches of the newsroom would seriously interfere with the ability of the press to gather, analyze and disseminate news, ruled that the fourth amendment was applicable to the press and journalists, just as it was applicable to all other property owners. Justice White, writing for the majority, noted that the framers

> did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impracticable, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated.[185]

The Court pointed out, however, that the fourth amendment did not prevent legislatures from establishing nonconstitutional protections against such searches,[186] and within a year after the decision at least six states had passed statutory limitations with bills pending in seven other states.[187] A number of federal bills are also pending in both the House and Senate, including two proposed by the Carter administration.[188]

(2) Protection of Confidentiality

Why should a journalist protected under the provisions of a state shield law favoring confidentiality and secrecy of news sources be denied a hearing on the issues of relevance, materiality and overbreadth of a subpoena seeking thousands of documents used in preparing an investigative story, documents protected under the statute?

This question was presented to the New Jersey Supreme Court in Farber v. Jascalevich.[189] While the court agreed that Farber, sentenced to six months in

jail and fined $1,000, and the New York Times, fined $100,000 plus $5,000 a day for every day the court order was disobeyed, were entitled to a hearing, the majority ruled that the right had been aborted since appellants had refused to submit the material subpoenaed for an in camera inspection by the court.[190] But, the court said, "those who in the future may be similarly situated are entitled to a preliminary determination before being compelled to submit the subpoenaed materials to a trial judge for inspection."[191] This brought a strong dissent from one member of the court who wrote:

> I find it totally unimaginable that the majority can even consider allowing a man to be sent to jail without a full and orderly hearing at which to present his defense. Mr. Farber probably assumed, as did I, that hearings were supposed to be held and findings made before a person went to jail and note afterwards.[192]

(3) Secret Subpoena of Records

Why should the government be permitted to secretly subpoena the telephone records of a news office or journalist without giving the news organization prior notice and an opportunity to oppose the subpoena in court?

This question was before the U.S. Court of Appeals in Reporters Committee v. American Telephone & Telegraph Co.[193] The Reporters Committee for Freedom of the Press sought declaratory and injunctive relief under the first and fourth amendments after it had been disclosed that various Nixon administration agencies had secretly subpoenaed the office and home telephone toll records of at least eight news organizations and journalists in an effort to discover the identity of their confidential news sources. The D.C. Circuit held that the first amendment was not violated by law enforcement officials' good faith inspection of journalists' telephone toll-call records that were released by the telephone company without prior notice to journalists. The court reasoned that any first amendment news gathering right was subject to those general and incidental burdens that arise from good faith enforcement of valid civil and criminal laws.[194]

The exacting measure of procedural due process desired and needed from the judiciary to safeguard first amendment freedoms is largely missing from any of the above examples. The unfavorable response by the courts to such due process concerns of the press has led the executive director of the Reporters Committee for Freedom of the Press to lament:

> If the courts can authorize surprise search warrants and rummage through every file in the newsroom; if the courts can subpoena an entire file of thousands of documents without showing that a single document is necessary; if the courts can secretly seize six months of personal and news office telephone records; if the courts can force disclosure of internal newsroom discussions and private thoughts; if the courts can override state legislatures and trample state shield laws--what is left of the concept that the government shall make no law abridging the freedom of the press?[195]

V. CONCLUSIONS

If the Supreme Court is to exercise its historic role as guardian of the fundamental freedoms flowing from the speech and press clauses of the first amendment, it is imperative that those basic freedoms be placed in a preferred position in any balancing-of-interests approach. One writer, noting the governmental barriers being erected to press freedom, borrowed a metaphor from Thomas Erskine's speech in defense of Thomas Paine's Rights of Man in characterizing the present Court as "a constitutional sentry fallen asleep."[196]

The broad scope of the preferred position doctrine, as discussed above, would provide adequate safeguards for both speech and press guarantees if carefully applied by the courts. This is true in part because the doctrine reflects more than its original emphasis upon elimination of the presumption of constitutionality employed during the 1940's. And not only does the preferred freedoms approach have strong historical underpinnings, the doctrine's premises are applicable, individually or in tandem with other judicial tests or doctrines, in a wide range of judicial contexts as discussed in Section IV above.

The conclusion is inescapable. If freedom of expression is to play the vital role visualized by the framers of the Constitution, a role which has been given at least rhetorical recognition by the majority of justices serving on the Supreme Court since Schenck, then these basic freedoms must be protected. The preferred position doctrine tends to place the courts in a more active role in safeguarding expression guarantees. The related clear and present danger test also emphasizes the role of the courts as guardians of first amendment rights. The balancing-of-interest approach, on the other hand, has been more characterized by judicial self-restraint and "rationalizations for letting legislatures have their own way."[197] While the preferred position approach may not give the absolute answers sought by the strict constructionists, the doctrine does supply standards for judicial judgment which would be more acceptable to first amendment libertarians than the balancing-of-interests approach presently being used by the Supreme Court.

Beyond the espousal of the preferred position doctrine as a legal theory, it also has utility as an article of faith in the democratic process.[198] Freedom of speech and press, as articles of faith, are so vital to the maintenance of a free society that their primacy must be recognized by both the courts and the general public. And while press responsibility is not mandated by the first amendment, the successful espousal of a preferred position must go hand in hand with a press performance which merits such a position and with an editorial vigilance sufficient to maintain a healthy and free marketplace of ideas without which the democratic process will flounder.

Reference Notes

[1]Justice Black, concurring in Smith v. California, 361 U.S. 147, 157-59 (1959), said of his absolutist position:

> I read "no law abridging" to mean no law abridging. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly "beyond the reach" of federal power to abridge. No other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal agencies, including Congress and this Court, have power or authority to subordinate speech and press to what they think are "more important interests."

But the balancing-of-interests theory repeatedly espoused by Justice Frankfurter has been the more frequent approach taken by the Supreme Court. Concurring in Dennis v. United States, 341 U.S. 494, 524-25 (1951), Justice Frankfurter noted that:

> The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

More recently Justice Blackmun, dissenting in the Pentagon Papers case, said:

> Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court.

New York Times Co. v. United States, 403 U.S. 713, 761 (1971).

[2]Id. at 716, 719.

[3]For a scholarly discussion of the controversial Acts, see J. Miller, CRISIS IN FREEDOM (1951) and J. Smith, FREEDOM'S FETTERS (1956).

[4]R. Fairfield, ed. THE FEDERALIST PAPERS, No. 84 (A. Hamilton), at 263-64 (2d ed. 1966).

[5]Gallup, Americans Favor Tougher Controls on the Press, EDITOR & PUBLISHER, Jan. 19, 1980, at 7.

[6]See, e.g., Landau, The State of the First Amendment, 23 NIEMAN REPORTS 18-25 (1979); Cronkite, Is the Free Press in America Under Attack? VITAL SPEECHES, March 15, 1979, at 231-34; Abrams, Judges and Journalists: Who Decides What? 28 NIEMAN REPORTS 34-41 (1974); Neuharth, The Dangers of an Imperial Judiciary, VITAL SPEECHES, Feb. 1, 1979, at 253-55; Methvin, Journalists Versus Justices, VITAL SPEECHES, Dec. 1, 1979, at 120-23.

[7]Speech by Jack C. Landau, Mid-America Press Institute on The State of the First Amendment--1980, St. Louis, Mo. (Jan. 25, 1980).

[8]Gallup, note 5 supra, at 7. A 1976 study of the interdependence of the media and the law finds ironic overtones in the dispute between the press and the courts. It is pointed out that judges, as well as journalists, depend on "moral suasion for effective institutional survival." And, the study notes:

> The central foundation of support for the rulings of the judiciary is the people. That support can be most effectively achieved through the media, . . . Such a condition might be thought to lead to a level of cooperation between those in the courtroom who interpret the law and those in the newsroom who write about the conduct of the public business.

H. Simons & J. Califano, THE MEDIA AND THE LAW 2 (1976).

[9]Cahn, The Firstness of the First Amendment, 65 YALE L.J. 464 (1956).

[10]The phrase is from McKay, The Preference for Freedom, 34 N.Y. UNIV. L. REV. 1182 (1959).

[11]Despite this, most mass communications law textbooks give scant attention to the preferred position doctrine. See, e.g., W. Francois, MASS MEDIA LAW AND REGULATION, 27, 32, 47, 87, 263-64 (2d ed. 1978); M. Franklin, MASS MEDIA LAW, 50, 51, 122, 448 (1977); D. Gillmor & J. Barron, MASS COMMUNICATION LAW, 27-34, 81, 172 (3d ed. 1979); H. Nelson & D. Teeter, LAW OF MASS COMMUNICATIONS, 11 (3d ed. 1978); D. Pember, MASS MEDIA LAW, 77-78 (1977). Another speech-press handbook for lawyers, J. Barron & C. Dienes, HANDBOOK OF FREE SPEECH AND FREE PRESS (1979), makes no mention of the preferred position doctrine.

[12]This metaphor is used in McKay, note 10 supra, at 34.

[13]T. Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3 (Vintage Books ed. 1966). The Court has also recognized a so-called "societal function" of the first amendment, a function aimed toward the preservation of free public discussion of governmental affairs. See, e.g., Saxbe v. Washington Post Co., 417 U.S. 843, 862-63 (1974); Houchins v. KQED, Inc., 438 U.S. 1, 31 (Stevens, J., dissenting). Two authorities often cited by the Supreme Court in enunciating the theory that self-government assumes an informed citizenry are James Madison and Alexander Meiklejohn. Madison addressed the general assumption:

> A popular Government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.

WRITINGS OF JAMES MADISON 103 (G. Gurst, ed. 1910).

Meiklejohn tied the societal function to the First Amendment:

> Just as far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation

of the thinking process of the community against which the First Amendment of the Constitution is directed.

A. Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

[14]W. Hocking, FREEDOM OF THE PRESS 164 (1947).

[15]See, e.g., K. Cooper, THE RIGHT TO KNOW (1956); H. Cross, THE PEOPLE'S RIGHT TO KNOW (1953); W. Marnell, THE RIGHT TO KNOW: MEDIA AND THE COMMON GOOD (1973); C. Whalen, YOUR RIGHT TO KNOW (1973); Emerson, Legal Foundations of the Right to Know, WASH. UNIV. L.Q., 1 (1976).

[16]Justice Rehnquist distinguishes the "utilitarian" justification, based upon the right of a citizen as a means to the end of achieving certain social purposes, from a second justification linked to the right to speak and publish freely which inheres in every individual. See Rehnquist, The First Amendment: Freedom, Philosophy, and the Law, 12 GONZAGA L. REV. 1, 2 (1976).

[17]See, e.g., Dennis, The Press and the Public Interest: A Definitional Dilemma, 23 DE PAUL L. REV. 937 (1974).

[18]Rehnquist, note 16 supra, at 7, quoting Z. Chafee, FREE SPEECH IN THE UNITED STATES 3 (1941).

[19]It should be noted that for the first 120 years following ratification of the Bill of Rights cases based upon first amendment issues never reached the Supreme Court. While the constitutionality of the Alien and Sedition Acts was never tested in the courts, the attack upon their validity is said to have "carried the day in the court of history." New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964). It was not until 1925 that the guarantees of the first amendment were made applicable to the states through the due process clause of the fourteenth amendment in the Court's landmark decision in Gitlow v. New York, 268 U.S. 652 (1925). One of the first judicial doctrines interpreting the first amendment was the "free trade of ideas" concept of Justices Holmes and Brandeis in 1919, that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). This so-called "marketplace of ideas" theory views the first amendment as a protector of truth emerging from the public discussion of competing ideas. But, as one commentary has noted, such a general theory or principle does not resolve "hard cases." The Court, through the years, has quested for "operative or functional tests permitting reasonably consistent decisions." H. Zuckman and M. Gaynes, MASS COMMUNICATIONS LAW, 6 (Nutshell Series 1977).

[20]Meiklejohn, note 13 supra, at 17. For a similar statement by Justice Black, see note 1, supra. See also, Cahn, Mr. Justice Black and First Amendment 'Absolutes': A Public Interview, 38 N.Y.U. L. REV. 37 (1962).

[21]Meiklejohn, note 13 supra, at 34-41. For an expanded discussion of these views, see A. Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960). An application of Meiklejohn's contextual approach is evident in the Court's formulation of a constitutional libel defense in New York Times Co. v. Sullivan, 376 U.S. 254, and its progeny.

[22]Chafee, review of A. Meiklejohn, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT (1948), 62 HARV. L. REV. 898 (1949). For a similar view, see Levy, LEGACY OF SUPPRESSION xix, 247-48 (Torchbook ed. 1963).

[23]Z. Chafee, FREE SPEECH IN THE UNITED STATES 31 (Anthenium ed. 1941). Chief Justice Vinson applied the balancing test in a 1950 case in passing upon the validity of congressional action against Communists. He wrote:

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 399 (1950).

[24]See, e.g., Note, The Speech and Press Clause of the First Amendment as Ordinary Language, 87 HARV. L. REV. 374, 379 (1973). The balancing approach raises other questions, for example, who should do the balancing, the legislature or the Court. Chief Justice Vinson in espousing balancing in American Communications Ass'n, CIO v. Douds, 339 U.S. at 399 (1950), viewed the legislature as carrying the primary responsibility. Such a view is associated with the doctrine of judicial restraint, that if a statute is reasonable then it should not be overturned. Justice Black would avoid balancing first amendment interests. He notes that:

> Of course the decision to provide a constitutional safeguard for a particular right, such as . . . the right of free speech protection of the First [Amendment], involves a balancing of conflicting interests. . . . I believe, however, that the Framers themselves did this balancing when they wrote the Constitution and the Bill of Rights.

Black, The Bill of Rights, 35 N.Y.U. L. REV. 865, 879 (1960). Balancing may also be classified as either "ad hoc," a case by case balancing of specific interests applicable to the facts of a particular case, or "definitional," where the balance struck has a more general application. See, e.g., Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Powell, 24 STAN. L. REV. 1001, 1026-27 (1972); Nimmer, The Right to Speak from Times to Time, 56 CAL. L. REV. 935 (1968).

[25]T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION, 718-21 (1970).

[26]Id. at 721.

[27]304 U.S. 144, 152 n. 4 (1938).

[28]The footnote was so described in Mason, The Core of Free Government, 1938-40: Mr. Justice Stone and "Preferred Freedoms," 65 YALE L.J. 597, 600 (1956).

[29]304 U.S. at 152 n. 4. See also, M. Shapiro, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 58-59 (1966); C. Pritchett, THE AMERICAN CONSTITUTION 305-8 (3d ed. 1977); S. Krislov, THE SUPREME COURT AND POLITICAL FREEDOM 28-39 (1968).

[30]See text accompanying notes 42-48, infra.

[31]See, e.g., McKay, note 10 supra, at 34, and Cahn, note 9 supra.

[32]For a documentation of these findings, see Cahn, note 9 supra, at 470-73.

[33]1 ANNALS OF CONG. 453 (1789).

[34]Bridges v. California, 314 U.S. 252, 265 (1941). For a critical discussion of Justice Black as political-legal historian, see Teeter and Yodelis Smith, Justice Black's "Absolutism": Notes on His Use of History to Support Free Expression in JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 29 (Dennis, Gillmor, Grey, eds. 1978).

[35]1 ANNALS OF CONG. 457 (1789). See also, Cahn, note 9 supra, at 468.

[36]See note 19 supra.

[37]249 U.S. 47 (1919).

[38]Id. at 52.

[39]See, e.g., McKay, note 10 supra, at 1191. Justice Holmes, noting in Schenck that "the character of every act depends upon the circumstances in which it is done," said: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S. at 52.

[40]Abrams v. United States, 250 U.S. at 630 (Holmes, J., dissenting).

[41]See, e.g., Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting); Stromberg v. California, 283 U.S. 359, 369 (1931) (Hughes, C.J., writing for the majority); Herndon v. Lowry, 301 U.S. 242, 258 (1937) (Roberts, J., writing for the majority); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J., writing for the majority); Lovell v. City of Griffin, 303, U.S. 444, 450 (1938) (Hughes, C.J., writing for the majority).

[42]See text accompanying notes 27-31, supra.

[43]See, note 29 supra, at 306.

[44]308 U.S. 147, 161 (1939).

[45]Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting). One source has suggested that the judicial origin of the preferred position concept might be found in Justice Cardozo's statement in an earlier decision that freedom of speech and thought is "the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. at 327. A similar position was taken in 1937 in Herndon v. Lowry, 301 U.S. at 258-59.

[46]Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[47]See, e.g., Poulos v. New Hampshire, 345 U.S. 395, 423 (1953) (Douglas, J., dissenting); United States v. Rumely, 345 U.S. 41, 56-57 (1953) (Douglas, J., concurring); Saia v. New York, 334 U.S. 558, 562 (1948); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Prince v. Massachusetts, 321 U.S. 158, 164-65 (1944). See also, McKay, note 10 supra, at 1223-27, for an appendix listing these and other preferred position statements.

[48]Thomas v. Collins, 323 U.S. 516, 529-30 (1945).

[49]Kovacs v. Cooper, 336 U.S. 77, 90, 95 (1949) (Frankfurter, J., concurring). For other denials, see Ullmann v. United States, 350 U.S. 422, 439-40 (1956); Poulos v. New Hampshire, 345 U.S. at 405; Jones v. Opelika, 316 U.S. at 594-96.

[50]McKay, note 10 supra, at 1192.

[51]336 U.S. at 95 (Frankfurter, J., concurring). Responding to Frankfurter's concurrence, Justice Rutledge wrote:

> I think my brother Frankfurter demonstrates the conclusion opposite to that which he draws, namely, that the First Amendment guaranties of the freedoms of speech, press, assembly, and religion occupy preferred position not only in the Bill of Rights but also in the repeated decision of this Court.

336 U.S. at 106 (Rutledge, J., dissenting).

[52]Id. at 96 (Frankfurter, J., concurring).

[53]Douglas v. City of Jeannette, 319 U.S. 158, 181 (1943). McKay, writing in 1959, note 10 supra, at 1182, considered Justice Frankfurter as the only justice to explicitly oppose the preferred position doctrine.

[54]See, Krislov, note 29 supra, at 117, citing Craig v. Harney, 331 U.S. 367, 391 (1947).

[55]McKay, note 10 supra, at 1190, states "that every member of the Court since 1919 has concurred in one or many of the collected expressions of preference for the first amendment."

[56]Krislov, note 29 supra, at 90.

[57]283 U.S. 697.

[58]New York Times v. United States, 403 U.S. 714.

[59]Id. at 714, quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) and Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[60]408 U.S. 665 (1972).

[61]Id. at 721 (Douglas, J., dissenting).

[62]418 U.S. 241 (1974).

[63]Id. at 258. For similar views of the Chief Justice about first amendment protection of the editorial process, see Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 124-25 (1973) and Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 393-95 (1973) (Burger, C.J., dissenting).

[64]See, e.g., McKay, note 10 supra, at 1184.

[65]See note 39 supra.

[66]376 U.S. 254.

[67]Id. at 285-86.

[68]Stewart, Or of the Press, 26 HASTINGS L.J. 633 (1975).

[69]Id. at 632.

[70]Id. at 633.

[71]Id. at 634.

[72]Id. at 636. The "checking value" in first amendment theory espoused by Vincent Blasi also provides strong justification for journalistic autonomy if free speech, free press, and free assembly are to serve in checking the abuse of power by putlic officials. See, Blasi, The Checking Value in First Amendment Theory, 3 AM. B. FOUNDATION RESEARCH J. 527, 625 (1977).

[73]Id. at 636.

[74]Abrams, The Press IS Different: Reflections on Justice Stewart and the Autonomous Press, 7 HOFSTRA L. REV. 563 (1979); Bezanson, The New Free Press Guarantee, 63 VA. L. REV. 731 (1977); Blanchard, The Institutional Press and Its First Amendment Privileges, (1978) SUP. CT. REV. 225; Bork, The First Amendment Does Not Give Greater Freedom to the Press Than to Speech, 12 CENTER MAGAZINE 28 (March-April, 1979); Comment, The Right of the Press to Gather Information After Branzburg and Pell, 124 U. PA. L. REV. 166 (1975); Lange, The Speech and Press Clauses, 23 U.C.L.A. L. REV. 77 (1975); Lewis, A Preferred Position for Journalism? 7 HOFSTRA L. REV. 595 (1979); Nimmer, Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech? 26 HASTINGS L.J. 639 (1975); Note, First Amendment Interest Balancing--Behind Bars? 33 U. MIAMI L. REV. 680 (1979); Note, The Supreme Court and the Not-So-Privileged Press, 13 UNIV. RICH. L. REV. 313 (1979); Powe, Or of the [Broadcast] Press, 55 TEX. L. REV. 39 (1976); Sack, Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press, 7 HOFSTRA L. REV. 629 (1979); Symposium Comment, The Supreme Court and the Press: Freedom or Privilege? 12 AKRON L. REV. 261 (1978); Van Alstyne, The Hazards to the Press of Claiming a "Preferred Position." 28 HASTINGS L.J. 761 (1977); Wharton, Freedom of Speech or of the Press: The Broadcaster as Citizen and Institution, 5 J. CONTEMP. L. 339 (1979).

[75]99 S.Ct. 1635 (1979).

[76]See, e.g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 (1978) (Stewart, J., concurring); Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. at 400 (Stewart, J., dissenting); CBS v. Democratic National Committee, 412 U.S. at 133-46 (Stewart, J., concurring).

[77]Abrams, note 74 supra, at 565-66, n. 14.

[78]435 U.S. 765 (1978).

[79]Goodale, News Media and the Law, (1978) COM. LAW 173.

[80]435 U.S. at 798-99.

[81]303 U.S. at 450.

[82]328 U.S. 331, 364 (1946).

[83]408 U.S. at 704-5.

[84]First Nat'l Bank of Boston v. Belotti, 435 U.S. at 802 (Burger, C.J., concurring).

[85]435 U.S. 829.

[86]435 U.S. at 839.

[87]Id. at 837.

[88]Id. at 849 (Stewart, J., concurring).

[89]Lange, note 74 supra, at 88.

[90]Abrams, note 74 supra, at 579.

[91]Nimmer, note 74 supra, at 658.

[92]Lewis, note 74 supra, at 599.

[93]Lange, note 74 supra, at 88-91.

[94]See, e.g., H. McLuhan, UNDERSTANDING MEDIA (1964); H. McLuhan & Q. Fiore, THE MEDIUM IS THE MESSAGE (1967).

[95]For an argument that the speech clause also affords protection for the medium of communication, see The Message, the Medium, and the First Amendment, address by Irving R. Kaufman, judge of the United States Court of Appeals, Second Circuit, at New York University School of Law (March 18, 1970).

[96]Sack, note 74 supra, at 633, citing Lovell v. City of Griffin, 303 U.S. 444, 452 (1938); First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 781; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

[97]427 U.S. 539, 560 (1976).

[98]Bork, note 74 supra, at 31.

[99]Id. at 30.

[100]Id. at 31. See also, Kampelman, The Power of the Press: A Problem for Our Democracy, POLICY REVIEW, Fall 1978, at 7.

[101]Van Alstyne, note 74 supra, at 769.

[102]Herbert v. Lando, 568 F.2d 974, 976 (2d Cir. 1977).

[103]See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415; Lovell v. Griffin, 303 U.S. 444; Philadelphia News, Inc. v. Borough Council, Etc., of Swarthmore, 381 F. Supp. 228 (E.D. Pa. 1974).

[104]Floyd Abrams as quoted in Gillmor, Even Our Supreme Court Friends Equivocate About the 'Right' That Protects Newsgathering, THE BULLETIN, December-January 1979, at 9.

[105]See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 124-25; Miami Herald Pub. Co. v. Tornillo, 418 U.S. at 258.

[106]See, e.g., Cox Broadcasting Co. v. Cohn, 420 U.S. 469; Landmark Communications, Inc. v. Virginia, 435 U.S. 829; Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977); Smith v. Daily Mail Pub. Co., 99 S.Ct. 2667 (1979). Contra, Zaachini v. Scripps-Howard Broadcasting Co., 433 U.S. 662 (1977) (right to publish denied by "right to publicity" of a public figure); F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) (right to broadcast words considered "indecent" denied).

[107]See, e.g., Branzburg v. Hayes, 408 U.S. at 681; Zemel v. Rusk, 381 U.S. 1, 17 (1965).

[108]408 U.S. at 684-85.

[109]417 U.S. 817 (1974).

[110]417 U.S. 843.

[111]417 U.S. at 834.

[112]417 U.S. at 850.

[113]417 U.S. at 830-31; 417 U.S. at 847, 849.

[114]417 U.S. at 830; 417 U.S. at 848.

[115]438 U.S. 1.

[116]Id. at 9.

[117]Id. at 16 (Stewart, J., concurring).

[118]Id. at 25-40 (Stevens, J., dissenting).

[119]Shapiro, note 29 supra, at 108.

[120]See text accompanying notes 57-67, supra.

[121]See, e.g., Patterson v. Colorado, 205 U.S. 454 (1907).

[122]Near v. Minnesota, 283 U.S. at 716.

[123]372 U.S. 58, 70 (1963).

[124]New York Times Co. v. United States, 403 U.S. at 714.

[125]402 U.S. 415, 419 (1971).

[126]Id. at 714.

[127]Barron and Dienes, note 11 supra, at 37.

[128]Freedman v. Maryland, 380 U.S. 51, 59-60 (1965). See also, National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Southeastern Promotions v. Conrad, 420 U.S. 546 (1975).

[129]See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, in which the Court invalidated the use of judicial "gag" orders where the circumstances used to justify them do not constitute a clear and present danger to the administration of justice.

[130]Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1976). See also, Smith v. Daily Mail Pub. Co., 99 S.Ct. 2667; First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765; Landmark Communications, Inc. v. Virginia, 435 U.S. 829; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469.

[131]For a discussion of the case, which never reached the Supreme Court, see H-Bomb Magazine Article Restrained, 3 THE NEWS MEDIA & THE LAW 62-68 (May-June 1979) and Progressive Case Ended, 3 THE NEWS MEDIA & THE LAW 52-53 (Nov.-Dec. 1979).

[132]413 U.S. 376.

[133]Id. at 395.

[134]Roth v. United States, 354 U.S. 476, 481 (1957).

[135]F.C.C. v. Pacifica Foundation, 438 U.S. at 731.

[136]Pennekamp v. Florida, 328 U.S. at 355 (Frankfurter, J., concurring). For a more recent judicial expression on fair trial and free press relations, see Burger, The Interdependence of Judicial and Journalistic Independence, 80 CASE & COMMENT 10 (1975).

[137]The Court in Nebraska Press Ass'n v. Stuart, 427 U.S. at 562, held that the clear and present danger test in such cases could be satisfied only when a trial judge had determined that: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of

unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger."

Chief Justice Burger, summing up his analysis of the confrontation between prior restraint imposed to protect one vital constitutional guarantee--a fair trial--and the explicit command of another that freedom to publish not be abridged, wrote: "We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact." Id. at 570.

[138]See, e.g., sections on "Gag Orders" and "Fair Trial-Free Press" in THE NEWS MEDIA & THE LAW (1977-1979).

[139]465 F.2d 496 (5th Cir. 1972), cert. denied, 414 U.S. 979 (1973).

[140]99 S.Ct. 2898 (1979).

[141]Id. at 2914-17 (Powell, J., dissenting).

[142]For a general summary of extensive post-Gannett efforts by the lower courts to close both pre-trial and trial proceedings, see Secret Courts: Special Report, 3 THE NEWS MEDIA & THE LAW 2-24 (Nov.-Dec. 1979).

[143]99 S.Ct. at 2912 n. 25.

[144]See text accompanying notes 37-39 supra.

[145]Craig v. Harney, 331 U.S. 367, 373 (1947); Pennekamp v. Florida, 328 U.S. at 335; Thomas v. Collins, 323 U.S. at 530; West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 633-34 (1943); Taylor v. Mississippi, 319 U.S. 583, 588-90 (1943); Bridges v. California, 314 U.S. at 263; Carlson v. California, 310 U.S. 106, 113 (1940); Thornhill v. Alabama, 310 U.S. 88, 104-5 (1940); Herndon v. Lowry, 301 U.S. at 260. In two other cases, Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949) and Cantwell v. Connecticut, 310 U.S. 296, 308-11 (1940), reference to the danger test appears to be dicta.

[146]341 U.S. 494.

[147]Id. at 510, quoting from the lower court opinion at 183 F.2d 201, 212 (2d Cir. 1950).

[148]For a discussion of the effect of the Dennis reinterpretation, see McKay, note 10 supra, at 1209-12.

[149]See Yates v. United States, 354 U.S. 298, 318 (1957).

[150]367 U.S. 290 (1961).

[151]The Brandenburg majority, in overturning Ohio's criminal syndicalism statute, said:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law

violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions.

Id. at 447.

[152]For a discussion of the history of the danger doctrine, see Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 STAN. L. REV. 719, 753 (1975).

[153]For a discussion of the contemporary approach used by the courts, see Barron & Dienes, note 11 supra, at 24-31.

[154]435 U.S. 829.

[155]The Chief Justice wrote:

Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed.

Id. at 842-43.

[156]427 U.S. at 562.

[157]See, e.g., Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974); Hess v. Indiana, 414 U.S. 105 (1973); Cohn v. California, 403 U.S. 15 (1971).

[158]For a listing of such cases, see Barron & Dienes, note 11 supra, at 30-31.

[159]376 U.S. at 279-80.

[160]Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[161]Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

[162]Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974). The complexity of the Gertz opinion and its impact on the law of libel, of course, goes far beyond the limited discussion here. See, e.g., Collins & Drushal, The Reaction of the State Courts to Gertz v. Robert Welch, Inc., 28 CASE W. RES. L. REV. 306 (1978); Stonecipher & Trager, The Impact of Gertz on the Law of Libel in Illinois, S. ILL. UNIV L.J. 73 (1979).

[163]Id. at 352. See also, Hutchinson v. Proxmire, 99 S.Ct. 2657, 2687-88 (1979); Wolston v. Reader's Digest Assn., Inc., 99 S.Ct. 2701, 2706-7 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).

[164]The District Court had ruled that a public libel plaintiff is entitled to a liberal interpretation of the rule concerning pre-trial discovery. Herbert v. Lando, 73 F.R.D. 387 (S.D.N.Y. 1977). On interlocutory appeal, the Second Circuit, reversed, concluding that: "If we were to allow selective disclosure

of how a journalist formulated his judgments on what to print or not to print, we would be condoning judicial review of the editor's thought processes." 568 F.2d 974, 980 (2d Cir. 1977).

[165]99 S.Ct. 1635, 1645-46 (1979).

[166]Id. at 1646-47.

[167]Id. at 1650.

[168]Id. at 1651 (Brennan, J., dissenting in part).

[169]Id. at 1663-66 (Marshall, J., dissenting).

[170]Id. at 1661. Justice Stewart wrote:

> What was not published has nothing to do with the case. And liability ultimately depends upon the publisher's state of knowledge of the falsity of what was published, not at all upon his motivation in publishing it--not at all, in other words, upon actual malice as those words are ordinarily understood.

[171]For a candid review of this criticism, see text of address by Justice Brennan, Newhouse Law Center in New York, delivered six months after the decision, 5 Med. L. Rptr. 1841 (Oct. 17, 1979).

[172]Goldfluss, Herbert v. Lando: No Cause for Alarm, 1 COMM. & THE LAW 68 (1979).

[173]For a discussion of this approach, see McKay, note 10 supra, at 1217-22.

[174]Thornhill v. Alabama, 310 U.S. at 99-102. See also, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975); Gooding v. Wilson, 405 U.S. 518, 525 (1972); Cohen v. California, 403 U.S. at 26.

[175]413 U.S. 15 (1973). One of the three prongs of the Miller Court's basic guidelines for "the trier of fact" is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." Id. at 24.

[176]Id. at 47 (Brennan, J., dissenting).

[177]See, e.g., Bigelow v. Virginia, 421 U.S. 809, 815-16 (1975); Gooding v. Wilson, 405 U.S. at 521-22; Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). See also, McKay, note 10 supra, at 1217-18.

[178]Bates v. State Bar of Arizona, 433 U.S. 350, 380 (1977).

[179]Id. at 380. But the Court, noting that overbreadth is "strong medicine," declined to apply it to professional advertising, "a context where it is not necessary to further its intended objective." Id. at 381.

[180]McKay, note 10 supra, at 1219-20. See also, Collings, Unconstitutional Uncertainty--An Appraisal, 40 CORNELL L.Q. 195 (1955).

[181]Justice Brandeis, for example, recognized the necessity for higher standards of procedural due process when "liberty of person and other constitutional rights" are in question. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring). And Justice Douglas has noted that "it is not without significance that most of the provisions of the Bill of Rights are procedural." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

[182]436 U.S. 547 (1978).

[183]Stanford Daily v. Zurcher, 353 F. Supp. 124, 135 (N.D. Cal. 1972).

[184]550 F.2d 464 (9th Cir. 1972).

[185]436 U.S. at 465.

[186]Id. at 567.

[187]See Newsroom-Search Decision Stirs State Actions, 1 PRESSTIME 30 (Nov. 1979).

[188]They are S855 and HR3486, see CONGRESSIONAL QUARTERLY 2838 (Dec. 15, 1979).

[189]394 A.2d 330 (N.J. 1978), cert. denied, 439 U.S. 997 (1978).

[190]394 A.2d at 337.

[191]Id. at 338.

[192]Id. at 343 (Pashman, J., dissenting).

[193]593 F.2d 1030 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1978).

[194]Id. at 1051.

[195]Landau, note 7 supra.

[196]Note, First Amendment Interest Balancing--Behind Bars? 33 UNIV. MIAMI L. REV. 680 (1979). Erskine said:

> Let us consider, my Lords, that arbitrary power has seldom or never been introduced into any country at once. It must be introduced by slow degrees, and as if it were step by step, lest the people should see its approach. The barriers and fences of people's liberty must be plucked up one by one, and some plausible pretenses must be found for removing or hoodwinking one after another, those sentries who are posted by the constitution of a free country for warning the people of their danger.

E. Walford, SPEECH OF THOMAS LORD ERSKINE 336 (1870).

[197]Pritchett, note 29 supra, at 312.

[198]For example, Judge Murray I. Gurfein, U.S. Court of Appeals, Second Circuit, who as district judge refused to prohibit publication of the Pentagon Papers, has noted that:

> . . . It is a faith that life can be lived better if we do have a free press. And surely, individual life can be lived better if we have free speech. This requires faith, as well however that the newspaper publisher is not only a businessman, but as the Savings Bank advertisements tell us, he is also "People." As one of the people, he is expected to avoid the grossly unfair or the grossly distasteful. The newspaper ethic is a variation of noblesse oblige. The fourth estate should acknowledge its contemporary rank as the only order of nobility tolerated in a republic.
>
> My theme is that the free press part of the First Amendment has become an article of faith like Americanism or motherhood. One does not have to prove that Americanism is the best way of life or that mothers are nice ladies.

Gurfein, Law and the Press, 51 N.Y.C. BAR J. 170, 172.